

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

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SUPREME COURT, U.S.

No.

77-6912

EDGAR GILBERT MILLER, Petitioner,

v.

COMMONWEALTH OF KENTUCKY, Respondent,

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF KENTUCKY

J. VINCENT APRILE II  
ASSISTANT DEPUTY PUBLIC DEFENDER  
STATE OFFICE BUILDING ANNEX  
THIRD FLOOR  
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II  
COUNSEL FOR PETITIONER

June 9, 1978

OF COUNSEL:

M. Gail Robinson  
M. GAIL ROBINSON  
ASSISTANT PUBLIC DEFENDER

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IN THE  
SUPREME COURT OF THE UNITED STATES  
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No. **77-6912**

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EDGAR GILBERT MILLER, Petitioner,

V.

COMMONWEALTH OF KENTUCKY, Respondent,

---

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF KENTUCKY

---

The petitioner, Edgar Gilbert Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on March 14, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky affirming petitioner's conviction for first degree robbery and reversing his conviction for first degree assault<sup>1</sup> was filed on January 31, 1978 and is not reported. The order of the Supreme Court of Kentucky denying a rehearing was entered on March 14, 1978. The mandate was entered by the Supreme Court on March 14, 1978. Copies of the above-mentioned opinion, order and mandate are attached hereto.

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<sup>1</sup>The Kentucky Supreme Court reversed petitioner's assault conviction because it violated KRS 505.020 which prohibits multiple prosecutions for the same offense.

### JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on January 31, 1978. Petitioner's timely petition for rehearing was denied on March 14, 1978. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on March 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

### QUESTIONS PRESENTED

#### I.

WHETHER PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE - REASONABLE DOUBT STANDARD OF PROOF?

#### II.

WHETHER THIS COURT'S RECENT DECISION OF TAYLOR V. KENTUCKY SHOULD BE APPLIED TO PETITIONER?

### CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the 6th and 14th Amendments to the Federal Constitution.

### STATEMENT OF THE CASE

Petitioner was indicted on December 14, 1976 for first degree robbery and first degree assault (Transcript of Record, hereinafter T.R., pp. 2-3). According to the indictment, petitioner on or about December 9, 1976 used physical force on Mona Miller in the course of committing a theft and intentionally caused serious physical injury to Ms. Miller by means of a pistol (T.R., pp. 2-3).

On April 19, 1977, appellant's trial counsel, Mr. Raines, filed a written motion for a continuance (T.R., p. 30). He attached an affidavit explaining why he needed that continuance (T.R., p. 31). Prior to the voir dire Mr. Raines explained in detail why he needed more time - basically because he needed to find alibi witnesses (Transcript of Evidence, hereinafter T.E., pp. 4-9). After the prosecutor noted that alibi witnesses were not necessary, the judge overruled petitioner's motion because "these cases do have

to be moved along" (T.E., p. 9).

Mr. Raines then moved to dismiss the assault indictment on the basis that Kentucky Revised Statutes 505.020 prohibited the prosecution of petitioner for robbery and assault for the same incident (T.E., pp. 14-16). The judge overruled his motion (T.E., p. 18).

The prosecutor called Mona Miller as a witness and she testified that on December 9, 1976, a man accosted her at work and beat her with a gun while telling her to get the money (T.E., pp. 75-78). Ms. Miller removed some stamps and cash from a safe and gave them to the man (T.E., pp. 79-80). She identified petitioner as her assailant and said she recognized him because he had been in the union office before (T.E., pp. 72-73, 80-81).

The prosecution's other evidence consisted of testimony that petitioner was not home when the police searched for him and left a message with his wife (T.E., pp. 123-124, 129), that petitioner was extradited from California (T.E., p. 150), and that petitioner allegedly told Detective Darrell Moody that he was at the union office on December 9 (T.E., p. 146).

Petitioner testified in his own behalf. He explained that he was in Nashville looking for jobs on December 9. He related that when he was in the parking lot of the Holiday Inn he saw a woman who said she was late for a fashion show and convention at the Holiday Inn (T.E., p. 171). Petitioner absolutely denied assaulting or robbing Mona Miller (T.E., p. 180).

On cross-examination, the prosecutor asked petitioner if anyone saw him in Nashville that day, and when petitioner said "yes" the prosecutor asked whether they would be at the trial (T.E., p. 191). The prosecutor asked the same question later during cross (T.E., p. 204).

The prosecutor was also permitted, over strenuous defense objection, to inquire into four prior felony convictions of petitioner's all of which were at least twelve years old (T.E., pp. 182-184). Petitioner had no other witnesses to testify for him.



Petitioner tendered an instruction on presumption of innocence - reasonable doubt that was rejected by the court (T.R., p. 34). After the court instructed the jury and the trial attorney gave his closing argument, the prosecutor made his argument where he hammered home that petitioner had no witnesses to back up his account of his whereabouts on December 9, 1976 (T.E., pp. 223, 225). The prosecutor also emphasized petitioner's prior felony convictions in his summation (T.E., pp. 225-226).

Petitioner was found guilty of first degree robbery and first degree assault and sentenced to twenty years in prison for each offense (T.R., pp. 33, 37, 42, 44).

## REASONS FOR GRANTING THE WRIT

### I.

THIS COURT HAS RECENTLY DECIDED A CASE ON THE NECESSITY FOR A PRESUMPTION OF INNOCENCE - REASONABLE DOUBT INSTRUCTION AND THIS CASE PRESENTS THE SAME ISSUE.

On May 30, 1978, this Court decided the case of Taylor v. Kentucky, \_\_\_ U.S. \_\_\_ (No. 77-5549; decided May 30, 1978). The issue before this Court in that case was whether the petitioner was entitled as a matter of due process of law to an instruction on the presumption of innocence - reasonable doubt standard of proof. Id., Slip Opinion, hereinafter S.O., at 1.

This Court observed that petitioner's trial was essentially a swearing contest between victim and accused. Id., S.O. at 2, 10. This Court also emphasized that the trial court's instructions were "rather Spartan" and that the court's "truncated discussion of reasonable doubt... was hardly a model of clarity." Id., S.O. at 4, 10. Analyzing particular aspects of Taylor's trial - the prosecutor's references to the indictment and warrant and his linking Taylor to other defendants who are now in the penitentiary - this Court held that there was "a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial." Id., S.O. at 9-10.

Like Taylor's trial, petitioner's trial was essentially

a swearing contest between petitioner and the alleged victim. Other than the instructions on the elements of first degree robbery and first degree assault, the judge's instructions at petitioner's trial were identical to those given at Taylor's. The judge instructed the jurors thus on reasonable doubt:

The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty (T.R., p. 33).

Significantly, this is the instruction included in Palmore 1 Kentucky Instructions To Juries, § 11.01 which is co-authored by Chief Justice Palmore of the Supreme Court of Kentucky. It is the standard Kentucky reasonable doubt instruction which has been approved by Kentucky's highest court. Merritt v. Commonwealth, Ky., 386 S.W.2d 727, 729 (1965).

Petitioner's trial counsel objected to the trial court's instruction on reasonable doubt and tendered an instruction on presumption of innocence - reasonable doubt (T.E., pp. 213-214; T.R., p. 34). His instruction read:

You are instructed that the Defendant, Edgar Gilbert Miller, is presumed to be innocent until the contrary is proved beyond a reasonable doubt. This presumption carries the force of law and can only be controverted by evidence which leaves the mind of each juror in that condition that he can say that he feels an abiding conviction, to a moral certainty, that the Defendant is guilty of each element of the offense charged.

You are further instructed that this standard of reasonable doubt applies to each element of the offense charged; therefore, you must acquit the Defendant, Edgar Gilbert Miller, unless you find beyond a reasonable doubt that the evidence actually introduced proves each element of the offense with which he is charged.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence (T.R., p. 34).

The trial court refused to give petitioner's instruction.

Petitioner asserts that an instruction on presumption of innocence - reasonable doubt was essential to providing him with due process of law. It was even more important at his trial than at Michael Taylor's.

At petitioner's trial the Commonwealth, over strenuous defense objection, asked petitioner on cross-examination about four prior felony convictions - 2 counts of armed robbery in 1954, forgery in 1960, burglary in 1964 and 3 counts of armed robbery in 1965 (T.E., p. 14). Defense counsel argued at a hearing on the question that the convictions were "too remote in light of the prejudice which they are bound to incur with regard to the jury" (T.E., p. 14). The judge ruled, however, that the convictions were admissible, and the prosecutor asked petitioner on cross-examination about the specific offenses he had committed (T.E., pp. 14, 182-184).

The prosecutor emphasized petitioner's prior record in his closing argument. He said:

Bear in mind those prior felonies that Mr. Raines talked about. They only go to whether or not he's telling the truth, and for you to consider those, as the judge said, only on the issue of whether or not he has told the truth in the courtroom today, and I say to you that seven different counts of armed robbery, one count of forgery, and one count of burglary in a man's past, that tells me that this man is not telling you the truth, and I don't believe that you can believe a word of his testimony, and that is about what that type of evidence can be introduced for (T.E., pp. 225-226).

Significantly, the prosecutor attributed seven counts of armed robbery to petitioner when in fact he had been convicted of only five counts. Of course, armed robbery was the offense for which petitioner was on trial once again.

The prosecutor also reiterated the judge's brief reasonable doubt instruction and even twisted it to make it more unfavorable to petitioner:



[A]and I say to you that that [sic] reasonable doubt is defined in those instructions, and that is the definition that you're supposed to look at and if you will look at it, it's No. 3, and it says that reasonable doubt is a real doubt, it's a substantial doubt, and you're not to ask yourself whether or not a better case might have been proved, but whether, after you hear all the evidence, that you will actually doubt the defendant is guilty.

Nothing is entirely free of doubt. Nothing is without doubt. There's some doubt about everything. Nothing is doubt-free. We're not asking you for any doubt. You have to find that there's a real, substantial doubt in your mind, and ladies and gentlemen, after Mrs. Miller's testimony, and after the testimony of this defendant, I don't see how there can be any reasonable doubt (T.E., p. 227).

The prosecutor was informing the jurors that they had to have "a real, substantial doubt" to acquit petitioner! What a perversion of the Commonwealth's burden!

Under the circumstances of petitioner's case, "the purging effect of an instruction on the presumption of innocence was essential to a fair trial." Id., S.O. at 8. The presumption of innocence was mentioned only once - in defense counsel's voir dire (T.E., pp. 36-37). The trial was a swearing contest between petitioner and the alleged victim. Petitioner was cast as a habitual violator of the law by his admission on cross-examination to four previous felony convictions, two of which were for the same crime for which he was being tried. In closing argument the prosecutor emphasized petitioner's long record and informed the jurors they had to have "a real, substantial doubt" to acquit petitioner. Furthermore, the judge gave the same sketchy and much-criticized instruction on reasonable doubt that the judge gave in Taylor's case.

On appeal petitioner urged that "the trial court deprived him of due process by refusing to give the defense-tendered instruction on the presumption of innocence and the meaning of reasonable doubt" (Petitioner's Brief For Appellant, pp. 19-22). He cited Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976) and various other cases. The state responded that the reasonable doubt instruction given by the court was proper and cited Palmore's Instructions, supra,

and Merritt v. Commonwealth, supra (Brief for Appellee, pp. 12-13).

Kentucky's Supreme Court described this assignment of error (and six others) as "patently without merit" and cited Merritt v. Commonwealth, id., and Taylor v. Commonwealth, Ky. App., 551 S.W.2d 813 (1976), disc. rev. denied June 29, 1977, rev'd sub nom. Taylor v. Kentucky, supra. Petitioner requested a rehearing of his case solely on the ground the Kentucky Supreme Court had misconceived the law on the presumption of innocence issue (Petitioner's Petition For Rehearing). The state responded that petitioner "strenuously argued" the issue in oral argument and that Kentucky's highest court advised that it did not intend to "change its mind" on the need for such an instruction until this Court decided the matter (Response to Petitioner's Petition For Rehearing). The Supreme Court of Kentucky denied the petition without comment.

This issue is now properly before this Court. Petitioner respectfully requests that this Court grant review of it.

## II.

THIS COURT SHOULD APPLY THE RULE OF LAW ANNOUNCED IN TAYLOR V. KENTUCKY TO PETITIONER.

Petitioner asserts that the rule of law announced in Taylor v. Kentucky, supra, clearly should apply to his case. Petitioner emphasizes that in Taylor this Court merely applied the principles announced in Estelle v. Williams, supra. As this Court observed in Taylor, "Estelle v. Williams quite clearly relates the concept of presumption of innocence to the cognate requirements of finding guilt only on the basis of the evidence and beyond a reasonable doubt, 425 U.S. at 503." Taylor v. Kentucky, supra, S.O. at 8 n. 13. This Court then emphasized that as long ago as 1895, the decision in Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), supported the conclusion that an instruction on the presumption of innocence - reasonable doubt standard of proof "is an element of Fourteenth Amendment due process. . . ." Taylor v. Kentucky, supra, S.O. at 8 n. 13. Coffin v. United States, supra, supported that proposition. Estelle v. Williams, supra, made it absolutely clear.

Even assuming arguendo that this Court should hold that the decision in Taylor v. Kentucky, supra, established "new law," that decision would indisputably be applicable to petitioner whose conviction was not final at the time of the decision. The major purpose of the decision in Taylor v. Kentucky, supra, is "to overcome an aspect of the criminal trial that substantially impairs its truth - finding function. . . ." Ivan v. City of New York, 407 U.S. 203, 204, 92 S.Ct. 1951, 32 L.Ed.2d 659, 661 (1972). The purpose of requiring a presumption of innocence instruction is to purge the jurors' minds of any beliefs they might hold that the defendant may be guilty because he was indicted or did not testify or had a prior record or some other extraneous matter. Taylor v. Kentucky, supra. "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial. . . ." Id., S.O. at 7. The presumption of innocence instruction is one important way of impressing upon the jury the importance of that right. Id.

The principle that a defendant is presumed innocent is closely related to the prosecutor's burden of proving guilt beyond a reasonable doubt. Id., S.O. at 5-7. This Court has decided in recent years two landmark cases on the prosecutor's burden of proof. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Both decisions have been declared fully retroactive. Ivan v. City of New York, supra (Winship); Hankerson v. North Carolina, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977) (Mullaney). Surely then Taylor v. Kentucky, supra, must at least be applicable to defendants whose convictions were not yet final at the time Taylor was decided.

In deciding that Winship and Mullaney are fully retroactive, this Court emphasized that the reasonable doubt standard those cases effectuated "provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'". . . . Ivan v. City of New York, supra, 407 U.S. at 204; Hankerson v.

North Carolina, supra, 97 S.Ct. at 2344. So does the instruction on presumption of innocence endorsed as essential in Taylor v. Kentucky, supra.

Since this Court in Taylor v. Kentucky, id., merely applied the clear principles of Estelle v. Williams, supra, and its precursors and progeny, the decision applies to petitioner. Even assuming arguendo that this Court holds that Taylor announced "new law," the decision applies to petitioner whose conviction was not final at the time of the decision. Ivan v. City of New York, supra; Hankerson v. North Carolina, supra. See Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968); Linkletter v. Walker, 381 U.S. 601, 607, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965).

Petitioner respectfully submits that this Court should grant review of his conviction in light of Taylor v. Kentucky, supra.

#### CONCLUSION

For the reasons detailed above, this Court should grant this petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

J. Vincent Aprile II  
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ASSISTANT DEPUTY PUBLIC DEFENDER  
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OF COUNSEL: M. Gail Robinson  
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ASSISTANT PUBLIC DEFENDER

#### SUPREME COURT OF KENTUCKY SC-410-MR

EDGAR GILBERT MILLER

APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE J. DAVID FRANCIS, JUDGE  
No. 17191  
No. 17192

COMMONWEALTH OF KENTUCKY

APPELLEE

#### MEMORANDUM OPINION PER CURIAM

AFFIRMING IN PART

REVERSING IN PART

Miller was convicted of first-degree robbery, KRS 515.020 (1), and first-degree assault, 508.010 (1) (a). His punishment was fixed at imprisonment for 20 years for each conviction. He was sentenced to imprisonment for a maximum of 20 years. He appeals and assigns eight errors.

On December 9, 1976 Miller forced a union official to open its safe and deliver money to him by beating her about the head and hands with a pistol. Thereafter and in order to accomplish his escape, he struck her at the base of the skull with the pistol. No further trauma was administered to the hands.

The instructions on first-degree robbery required the jury to believe that the theft was accomplished either by beating the official about the head and hands or while armed with a deadly weapon. The verdict does not disclose whether the jury believed one or both alternatives.



The instructions on first-degree assault required the jury to believe that the official was beaten on the hands. The verdict discloses that the jury believed this.

Miller submits that he should not have been convicted of the first-degree assault charged because the beating upon which it was founded may not be eliminated as an essential element of the first-degree robbery charge. KRS 505.020. We agree. *Sherley v. Commonwealth, Ky.*, \_\_\_ S.W. 2d \_\_\_ (decided November 18, 1977).

The other seven assignments of error are patently without merit and need not be discussed in detail. It is enough to refer counsel to: *Taylor v. Commonwealth, Ky.*, 545 S.W. 2d 76 (1976); *Owens v. Commonwealth, Ky.*, \_\_\_ S.W.2d \_\_\_ (decided December 13, 1977); *Bogie v. Commonwealth, Ky.*, 467 S.W. 2d 767 (1971); *Taylor v. Commonwealth, Ky. App.*, 551 S.W. 2d 813 (Discretionary Review Denied June 29, 1977, Cert. Granted November 28, 1977); *Merritt v. Commonwealth, Ky.*, 386 S.W. 2d 727 (1965); *Wells v. Commonwealth, Ky.*, \_\_\_ S.W. 2d \_\_\_ (decided January 10, 1978); *Davis v. Bennett's Adm'r.*, 279 Ky. 799, 132 S.W. 2d 334 (1939); *Alcorn v. Commonwealth, Ky.*, 557 S.W. 2d 624 (1977).

The judgment of conviction of the charge of first-degree assault is reversed and the cause is remanded with directions to dismiss that charge. In all other respects the judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

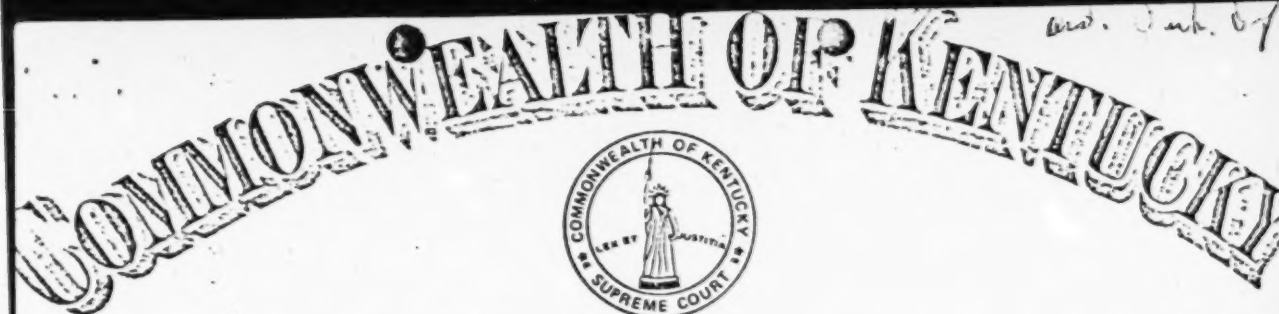
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# Supreme Court of Kentucky

MANDATE

EDGAR GILBERT MILLER

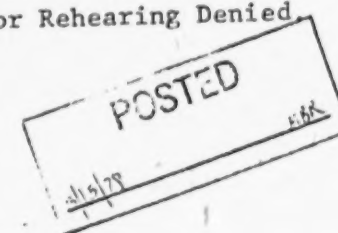
File No.	SC-410-MR	Appeal From	Warren
VS. Opinion Rendered	January 31, 1978	Circuit Court Action No.	Ind. #17191 #17192

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

March 14, 1978 Appellant's Petition for Rehearing Denied.



A Copy - Attest

March 14, 1978  
Issued .....

*Martha Layne Collins*  
MARTHA LAYNE COLLINS, CLERK